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IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271 OF THE TELECOMMUNICATIONS ACT OF 1996	DOCKET NO. T-00000A-97-0238
IN THE MATTER OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 252(e) OF THE TELECOMMUNICATIONS ACT OF 1996	DOCKET NO. RT-00000F-02-0271
ARIZONA CORPORATION COMMISSION Complainant. v. QWEST CORPORATION Respondent.	DOCKET NO. T-01051B-02-0871 **AT&T's RESPONSE TO SETTLEMENT AGREEMENT FILED JOINTLY BY QWEST AND STAFF JULY 25, 2003**

AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively, "AT&T") hereby respond to the proposed Settlement Agreement filed by the Staff of the Arizona Corporation Commission ("Staff") and Qwest Corporation ("Qwest") in the above referenced proceedings.

AT&T intends to participate fully in the Commission proceeding on the proposed Settlement Agreement. This initial response foreshadows AT&T's position in that proceeding and will advance the Commission's goal of "full and fair consideration" of the Settlement Agreement.[1] This filing also responds to the Commissioners' expressed willingness to have parties file, in advance of the hearing, specific questions and issues raised by proposed Settlement Agreement.[2]

I. INTRODUCTION

On Thursday, July 3, 2003, the day before the Independence Day holiday, the staff of the Arizona Corporation Commission ("Staff") provided certain competitive local exchange carriers ("CLECs") with a list of settlement principles agreed to by Staff and Qwest. Parties were asked to provide brief comments on these principles by July 8, 2003 – two business days later. A meeting was held on July 10, 2003, at which Qwest, Staff and certain other interested parties discussed the terms of the settlement.[3]

On Friday, July 11, Staff distributed a new draft Settlement Agreement that reflected the settlement principles discussed on July 10, but included none of the changes proposed by the CLECs. Staff requested that the parties provide proposed revisions in summary and red-line form by 11:00 a.m. Monday, July 14.[4] AT&T declined to provide wordsmithing changes to a document with which it fundamentally disagreed and which contained none of the changes discussed with Qwest and Staff on July 10. A final

[1] *See* Letter from Chairman Spitzer to fellow Commissioners of July 28, 2003 (filed in above captioned dockets).
[2] *See* Letter from Commissioner Mundell to fellow Commissioners of August 1, 2003 (filed in above-captioned dockets).
[3] Staff and Qwest did not notify all of the CLECs that are parties to the Litigation, as defined in the Settlement Agreement, of the settlement negotiations or the settlement principles, nor did they invite all of these parties to the meetings.
[4] Unfortunately, Staff sent the parties a .pdf document, which made red-lining impossible without retyping the entire agreement.

meeting was held on July 14 at 2:00 p.m. to discuss further changes to the Settlement Agreement.

The settlement principles and the terms of the initial draft Settlement Agreement were negotiated by Qwest and Staff without any input from the CLECs. It was only after Qwest and Staff had negotiated the fundamental terms of a settlement that the CLECs' input was solicited. Thus, the CLECs were basically placed in a take-it-or-leave-it position. None of the fundamental settlement principles were changed in response to the CLECs' concerns. This is very disturbing to AT&T, which has meaningfully participated in all three of the captioned cases, and supported the monetary and non-monetary penalties proposed by Staff. Qwest and Staff negotiated the terms of a Settlement Agreement in secret without any CLEC participation; having done so they ignored the genesis of several of the cases – that Qwest negotiated *secret* agreements with certain CLECs that Qwest did not file with the Commission and did not make available to all CLECs pursuant to Section 252 of the Telecommunications Act of 1996 ("the Act"). It is difficult to imagine a more ironic scenario.

In its direct testimony in the Section 252(e) case, the Staff witness testified that "[t]he penalties are intended to help ameliorate the anti-competitive outcome of the unfiled agreements and to remedy the adverse impact on the emergence of local competition in Arizona."[5] In the Staff Report and Recommendation in the Section 271 sub-docket, Staff stated: "[t]he evidence shows that Qwest intentionally prevented the carriers from raising issues that would have reflected adversely on Qwest's compliance with Section 271 requirements. These actions could have disadvantaged competitors, and

[5] Docket No. RT-00000F-02-0271, Direct Testimony of Marta Kalleberg, dated February 21, 2003, Executive Summary at 1 ("Kalleberg Direct").

interfered with the integrity of the Commission's processes."[6] In the Show Cause proceeding, Staff noted in its draft proposed order that "[t]he inability of Qwest to make wholesale rate changes in a reasonable amount [of] time and to charge accurate rates to CLECs creates an unlevel playing field and results in discriminatory treatment by Qwest relative to how it treats its retail customers. … The preceding issues have implications for application for 271 relief as well."[7]

In all three proceedings, Staff acknowledges the effect on competition and injury to CLECs, and yet the CLECs were not made a part of the settlement negotiations until the very last minute. The CLECs were denied the ability to affect the debate on the scope and terms of the settlement. Considering the history and nature of the cases, this made no sense.

Although the Settlement Agreement may appear to be reasonable, after one reviews each of the terms in the context of the evidence and the penalties initially proposed by Staff, it immediately becomes apparent that the terms of the settlement are inadequate, and that the Settlement Agreement should be rejected.

II. ARGUMENTS

A. Cash Payment

The Settlement Agreement provides that Qwest will pay the following penalties:

1. $5,000,000 for resolving the penalties in the Section 252(e) proceeding and the Section 271 sub-docket;
2. $47,000 in additional penalties for the Section 252(e) proceeding; and
3. $150,000 for the Show Cause proceeding.

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[6] Docket No. T-00000A-97-0238, Section 271 Sub-Docket – Staff Report and Recommendation dated May 6, 2003, at 3 ("Section 271 Sub-Docket Report").

[7] Docket No. T-01051B-02-0871, Staff Memorandum dated November 26, 2002, draft Complaint and Order to Show Cause, ¶ 35. This language is contained in Decision No. 65450 at paragraph 36.

A total of $5,197,000, therefore, would be paid to the General Fund. This is approximately one-fourth of the total amount of fines proposed by Staff in the three proceedings.

In the Section 252(e) proceeding, Staff proposed that Qwest be required to pay a total cash penalty of $15,047,000. In the Section 271 sub-docket, Staff recommended a cash penalty of $7,415,000. Finally, in the Show Cause proceeding, Staff recommended a cash penalty in the amount of $189,000. Thus, Staff's total recommended penalties for the three proceedings was $22,651,000.

1. Staff's Proposed Penalties Already Represented a Substantial Reduction From Maximum Allowable Penalties.

One could argue that the over $22 million in penalties originally proposed by Staff was substantial. However, the penalties originally proposed by Staff were far less than the maximum penalties allowed by law. Staff maintains that the maximum allowable penalty for the Section 252(e) case is $44,450,000,[8] for the Section 271 sub-docket, $7,415,000,[9] and for the Show Cause proceeding, $1,260,000,[10] for a maximum total penalty in the amount of $53,125,000. Therefore, Staff's recommended penalties represented only 43% of the total possible penalty. The settlement amount represents a only 10% of the maximum allowable penalty.

2. The Settlement Penalties are Inadequate Based on the Evidence.

Arguably, in light of the intentional and egregious nature of Qwest's conduct, the Staff's initial recommendations were too low. In any event, there is absolutely no basis, and Staff provides none, for slashing the penalties recommended by Staff by 75%.

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[8] Docket No. RT-00000F-02-0271, Staff Initial Post-Hearing Brief at 21.

[9] Staff is recommending the maximum penalty allowed in the Section 271 sub-docket.

[10] Docket No. T-01051B-02-0871, Direct Testimony of Mathew J. Rowell dated April 17,2003, at 14-16 ("Rowell Direct").

The three proceedings that the Staff and Qwest seek to settle are extraordinary. In each, Staff has found that Qwest engaged in manifestly and willfully improper behavior.

1) Section 252(e) Proceeding

In the Section 252(e) proceeding, Staff concluded that:

(a) Qwest failed to comply with the following statutes and regulations: 47 U.S.C. § 252(e), Ariz. Adm. Code R14-2-1112, R14-2-1307, R14-2-1308, R14-2-1506 and R14-2-1508;[11]

(b) "The decision to enter into a unique and discriminatory relationship with Eschelon was an intentional and willful decision by Qwest";[12]

(c) "The relationship between McLeod, U S WEST and later, Qwest, was unique and discriminated against other CLECs who could not view and possibly opt-in to the agreements between the parties since they were not publicly filed";[13]

(d) "The decision to enter into a unique and discriminatory relationship with McLeod was an intentional and willful decision by Qwest";[14]

(e) "Staff has determined that with regard to the Eschelon and McLeod agreements and non-participation clauses contained in unfiled agreements, Qwest's actions were intentional, willful, and contrary to Commission rule and processes";[15]

(f) "*The signal must be sent that Qwest's actions are highly egregious and unacceptable and the negative impact of these actions must be remedied*".[16]

[11] Kalleberg Direct at 2.
[12] *Id.* at 23.
[13] *Id.* at 35.
[14] *Id.* at 39.
[15] *Id.* at 76.
[16] *Id.* (emphasis added).

2) Section 271 Sub-Docket

Staff released its Section 271 Sub-Docket – Staff Report and Recommendation on May 6, 2003. "[T]he Section 271 sub-docket was specifically set up to examine the issue of Qwest's interference with the Arizona Section 271 process and proceeding through the use of non-participation and/or non-opposition clauses in secret agreements with certain CLECs."[17] Staff found and concluded that:

(a) "Information gathered by Staff shows that Qwest attempted to silence two of its largest wholesale competitors, among others, during critical timeframes of the Commission proceedings";[18]

(b) "Qwest used the [Eschelon] agreement on several occasions to keep Eschelon from appearing in Section 271 workshops and Change Management Process ('CMP') proceedings where it would have brought issues to the Commission's attention which would have entered into the Commission's ultimate determination as to whether Qwest met certain Section 271 checklist requirements";[19]

(c) "The evidence shows that Qwest intentionally prevented the carriers from raising issues that would have reflected adversely on Qwest's compliance with Section 271 requirements. These actions by Qwest could have disadvantaged competitors, and interfered with the integrity of the Commission's processes."[20]

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[17] Section 271 Sub-Docket Report at 2.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 3.

3) Show Cause Proceeding

The Show Cause proceeding was initiated to determine generally why Qwest took more than six months to implement the Commission's June 12, 2002, Decision No. 64922, and why it takes Qwest substantially longer to implement wholesale rate changes than it does to implement retail changes. The Staff concluded that:

(a) "six months is clearly an excessive and unreasonable amount of time for the implementation of the wholesale rates ordered by Decision No. 64922";[21]

(b) "the five-month average indicates that Qwest's wholesale rate change system as a whole is unreasonably slow and inefficient";[22]

(c) "Implementing the wholesale rates for states that had pending 271 applications ahead of the Arizona rates would have been the result of a conscious decision on the part of Qwest's management";[23]

(d) "in spite of the Commission's order to implement the Arizona rates immediately, Qwest diverted resources to the implementation of rates for the nine states listed in Table 2".[24]

It is incomprehensible to AT&T that the same Staff that made these findings would so greatly reduce the penalties without any explanation for the change. Staff inexplicably has backed off from its earlier, appropriate, conclusion that "[t]he signal must be sent that Qwest's actions were highly egregious and unacceptable."[25]

AT&T believes that the penalties initially proposed by Staff should be imposed and that settlement should accordingly be rejected.

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[21] Rowell Direct at 8.
[22] *Id.,* at 9.
[23] *Id.,* at 11.
[24] *Id.,* at 15.
[25] Kalleberg Direct at 76.

B. Voluntary Contributions

One of the more troubling aspects of the Settlement Agreement is the section labeled "voluntary contributions."[26] Not only does this section artificially inflate the overall value of the settlement, it also gives Qwest credit for legal obligations it already has, or forces new obligations on Qwest, that are unrelated to the issues raised in the proceedings. It permits Qwest to convert what should be a penalty into a public relations coup. The three proceedings focus on harm to competition and to the CLECs. The remedies should therefore focus on remedying the harm to competition and the CLECs -- not on establishing a fund from which Staff can advance pet projects unrelated to the harm caused by Qwest's actions.[27]

In the Section 252(e) proceeding, Qwest entered into secret agreements that it did not file for Commission approval, thus denying all CLECs the opportunity to opt-in to these agreements pursuant to the federal Act. In the Section 271 sub-docket, the evidence shows that Qwest interfered with the Section 271 process, to the disadvantage of the CLECs. In the Show Cause proceeding, the evidence shows that the CLECs did not receive the benefits of the Commission's rate order for over six months, and Qwest's wholesale rate changes on average take over 90 calendar days, versus 30 calendar days for retail rate changes. All of these issues affect the CLECs and their ability to compete with Qwest. The Commission must ask why Qwest should be given credit for education,

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[26] There is nothing "voluntary" about the "contributions." If Qwest had not agreed to Staff's conditions, there would be no Settlement Agreement.

[27] Section 20 of the Settlement Agreement states that the Agreement represents a "mutual desire to compromise and settle all disputed claims at issue in the Litigation in a manner consistent with the public interest *and based upon pre-filed testimony and exhibits and the evidentiary record developed in the Litigation*." (Emphasis added). AT&T could not find any reference to "voluntary contributions" in the record except for RUCO's recommendation that Qwest be required to accelerate its deployment of broadband services.

economic development and infrastructure development when the settlement fails to fully remedy the harm to competition and the CLECs.

If the Commission believes that education, economic development or infrastructure investment is necessary, and it has the constitutional and statutory authority to address these issues, it should do so on the record, with an explanation as to why doing so is in the public interest. If it does not have such authority, it should not be creating a fund as a part of a settlement of unrelated cases, to assist in exercising such authority.

If Qwest has legal obligations to serve unserved or underserved areas, the Commission should initiate a show cause proceeding to determine why Qwest is not serving such areas. If it does not, Staff should not be using these proceedings to force Qwest to serve areas it has no legal obligation to serve.[28]

The settlement also would allow Qwest to take credit for investment in advanced services. Based on the press release issued by the Federal Communications Commission in the Triennial Review proceeding, CLECs will not have access to Qwest's investment in advanced services on a resale or wholesale basis under the Act. It seems surreal that Staff would permit Qwest to make investments in advanced services -- investments CLECs will not have access to under Section 251(b) and (c) -- as a remedy for Qwest's harm to competition and to the CLECs.

Furthermore, the language permits investment that promotes "the general welfare or safety of consumers." This language is so broad that arguably *any* investment would qualify. And although the Agreement tries to limit voluntary contributions to investment

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[28] If Qwest has no legal obligation to serve an area, there is some question as to whether Qwest can recover the cost of the investment from ratepayers.

that is not already planned, this provision is meaningless and subject to manipulation by Qwest.

Should the Commission retain this section, the type of infrastructure investment should be expanded to include facilities that would be used to provide Section 251(b) and (c) services. This would target investment in areas that would directly benefit CLECs. Furthermore, the Settlement Agreement restricts the parties that may propose or oppose expenditures under the section on voluntary contributions: In order to propose or oppose an expenditure, the party must be a signatory to the Settlement Agreement. There is no basis for including such a limitation. Considering the nature of the litigation, *any* CLEC should be able to propose or oppose an expenditure.

The Commission should reject the settlement because of these flaws in the voluntary contribution provisions.

C. Discount Credits

The section on discount credits is one of three provisions that is apparently tailored to remedy the harm to competition and to the CLECs. However, Qwest and Staff have significantly restricted the scope of the provision, thereby failing to remedy past discrimination.

The Settlement Agreement provides for a one-time credit to eligible CLECs of 10% of the total *Section 251(b) and (c) services* purchased from January 1, 2001, to June 30, 2002. Furthermore, the Agreement sets a maximum distribution to the CLECs of $8,910,000 under the terms of this section. If CLECs submit claims in excess of this amount, the CLECs will share ratably. A CLEC must release *all* claims it may have to obtain credit for only Section 251(b) and (c) services.

The most glaring problem with this provision is that it does not include all of the services that Eschelon and McLeod received discounts on. Staff's brief noted that "[t]he most significant concession provided to both Eschelon and McLeod in their unfiled agreements was a 10 percent discount on all of the carriers' purchases of Qwest's services, including but not limited to, Section 251(b) and (c) services…."[29] Eschelon and Qwest received discounts on Section 251(b) and (c) services, intrastate and interstate switched access, special access and private line, and all other services Eschelon and McLeod purchased from Qwest. There is no reason to limit the remedy and scope of the discount that the other CLECs would receive under the settlement. The "voluntary contributions" could be eliminated and the money earmarked to discount credits to expand the scope of services for which discount credits would be received.

There is no question that Eschelon and McLeod received discounts on services in addition to Section 251(b) and (c) services. Since not all CLECs purchase the same services or have the same product mix, by eliminating certain services, the remedy will treat all CLECs differently. For example, CLECs purchasing special access will receive no discount under the plan, although another CLEC purchasing network elements will. Thus, the remedy as structured is inherently discriminatory. To remedy past discrimination and harm, all services must be included in the settlement provisions.

In addition, by excluding special access, the remedy effectively rewards Qwest's past illegal behavior. Qwest maintained that high capacity (*e.g.* DS-1) loops were not included in the FCC's definition of network elements until the FCC released its *UNE*

[29] Staff's Initial Post-Hearing Brief at 16-17.

Remand Order,[30] although the FCC's *First Report and Order* was explicit that high capacity loops were included in the definition of unbundled loops.[31] Therefore, CLECs were forced to purchase non-cost-based special access in lieu of DS-1 loops at substantially higher prices. Staff implicitly condones Qwest's past behavior by including such generous terms in the Settlement Agreement.

It is a violation of State law to provide discounts on tariffed services in a manner that discriminates among carriers. A.R.S. § 40-334(A); *Southern Pac Co. v. State Corp. Comm.,* 39 Ariz 1, 3 P. 2d 518 (1931). AT&T raised this issue a number of times, but was ignored. By failing to include tariffed services within the scope of the discount credit, this obvious violation of State law goes unremedied. A lawful remedy is to extend the discount credit to tariffed services for all carriers, thereby effectively changing the tariffed rate for all carriers for the discount period.

The settlement limits the period of purchases to January 1, 2001, through June 30, 2002, or sixteen months. Eschelon's contract initially had a term of five years. Eschelon's contract commenced November 15, 2000, and subsequently was terminated effective February 28, 2001, a term of approximately 15 ½ months.[32] However, Eschelon received a payment of $7,912,000 to terminate the agreement, and there is no way to verify that this payment did not represent an up-front discount against future purchases.[33] The McLeod contract commenced October 26, 2000, and ran to September 20, 2002, or

[30] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Third Report and Order, FCC 99-238 (rel. Nov. 5, 1999) ("*UNE Remand Order*").
[31] *Implementation of the Local Competition Provisions in The Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996), ¶¶ 380 & 385. In the *UNE Remand Order*, the FCC declined to amend its definition to exclude high-capacity loops. *UNE Remand Order*, ¶¶ 175-177.
[32] Staff's Initial Post-Hearing Brief at 17.
[33] Docket No. RT-00000F-02-0271, Joint Ex. 1, No. 6.

23 months.[34] Therefore, the length of the discount in the Settlement Agreement should be the longest period that the 10% discount was available, or 23 months.

This discount should also be paid prospectively on future purchases made by CLECs. Eschelon and McLeod had the opportunity to make prospective business decisions with the knowledge that they had a discount of 10% on all future purchases for the length of the contracts. To remedy the harm to the CLECs and competition, the remedy should be structured so all other CLECs also have the opportunity to make investment decisions going forward with the knowledge they will receive a discount of 10% on all purchases. This puts the other CLECs in the same position Eschelon and McLeod were in. The remedial effect on competition and the CLECs obviously will be greater. Instead of receiving a one-time, lump-sum credit for purchases made in the past, CLECs would receive a 10% discount on all purchases going forward. These purchases represent investments in *future competition*, that promote competition. Although a one-time payment to the CLECs will remedy some of the harm incurred by the CLECs, a one-time payment on past purchases is less effective in remedying the harm to competition.

Qwest and Staff have limited the discount credit to Section 251(b) and (c) services; however, the Release of All Claims requires the CLECs to release Qwest from *all* discriminatory and unlawful conduct, whether such conduct was a violation under federal or State law. Qwest expects the CLECs to waive all federal and State tariff claims they have against Qwest because Qwest unlawfully provided Eschelon and McLeod with discounts of 10% on all intrastate and interstate services, but the settlement omits the same set of services from the calculations of the discount. AT&T can

[34] *Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements,* Docket No. P-421/C-02-197, Order Assessing Penalties (Minn. PUC Feb. 28, 2003) at 5. *See also* Staff's Initial Post-Hearing Brief at 16-17 (Confidential).

understand why Qwest would not insist on such a provision. AT&T cannot understand why Staff would require CLECs to waive claims they may have that are not addressed and compensated under the terms of the settlement.

The discount provision is the most important and relevant term of the Settlement Agreement because it is specifically related to addressing the harm to competition and to the CLECs. The penalties go to the State of Arizona; the voluntary contributions benefit Qwest. Yet, over one-half of the alleged value of the settlement does not benefit competition or the CLECs.

The structure of the settlement is seriously flawed. The focus should be on remedying the harm to competition and the CLECs. The section on discounts needs to be modified to provide for future discounts on all services purchased by CLECs for a period of 23 months. Until the flaws are remedied, the Settlement Agreement should be rejected.

D. Access to Line Credits and UNE-P Credits

The Settlement Agreement provides for access line credits and UNE-P credits. These two credits are based on provisions contained in Eschelon's agreements. The Settlement Agreement provides for maximum credits of $660,000 and $550,000, for the access line credits and UNE-P credits, respectively.

AT&T must point out two issues. First, the credits should be prospective and should be for 23 months instead of 16 months. As noted in its discussion of the discount credits, these changes would provide greater remedial benefits. Second, AT&T is concerned with the problem of documentation. The period that is subject to recovery ended several years ago. This will make the retrieval and production of documentation more difficult. AT&T's concern is heightened by the language in the Settlement Agreement which allows Qwest to reject the CLECs' documentation. Section 5.D. The greatest flexibility possible should be afforded the CLECs in substantiating the basis for their credits. Moreover, the problem of documentation would be eliminated if the credits were provided prospectively.

E. Additional Voluntary Contributions

The section on additional voluntary contributions highlights the fundamental flaws with the Settlement Agreement: 1) the remedies are not focused on addressing the harm to the CLECs and competition; and 2) the Settlement Agreement inflates the value of the settlement.

The settlement consists of the following monetary allocations:

1. Penalties	$5.197 Million
2. Voluntary Contributions	$6.0 Million
3. Discount Credits	$8.1 - 8.9 Million
4. Access Line Credit	$.6 – .66 Million
5. UNE-P Credit	$.5 – .55 Million
Total	$20.397 – 21.317 Million

As noted earlier, Qwest receives the value of the voluntary contributions. It retains ownership of the facilities invested in or built. Therefore, the claimed value of the settlement must be reduced by at least $6 million.

Furthermore, since the discount credits, access line credits, and UNE-P credits are paid on claims actually made by CLECs, there is a high probability that Qwest will not pay to CLECs the level of fines represented in the Settlement Agreement. Many of the

CLECs that no longer exist may not submit any claims. Some CLECs may not participate because they would have to release *all* claims against Qwest. Therefore, to the extent Qwest is not required to disburse the funds allocated to the CLECs, the funds are reallocated and subject to the voluntary contribution provision. Accordingly, Qwest retains a larger share of the settlement and benefits. The way to ensure that all of the credits are paid out to CLECs is to make the credits prospective.

The Commission should approach remedies in a different manner. First, the Commission should set the level of penalties based on the evidence in each proceeding, without regard to some arbitrary total settlement value. This money will go to the State of Arizona. Penalties serve two purposes: they partially compensate the State for the harm suffered because of Qwest's actions, and they act as a deterrent against future violations of the law. Next, the Commission should order remedies that serve to remedy the harm to competition and to the CLECs. The credits, structured as recommended by AT&T, would attempt to address those harms. Voluntary contributions are unnecessary and currently reduce the amount of credits available to the CLECs.

As stated earlier, voluntary contributions serve to inflate the amount of the settlement "package." The CLECs obtain no benefits, and the investment is unrelated to the issues raised in this proceeding. The contributions simply provide the Staff with a fund to support projects that Qwest is unwilling to fund voluntarily. Calling the contributions "voluntary" is misleading because Qwest is in no sense of the word voluntarily providing these investments. There is definitely a *quid pro quo*.

Staff, by locking itself into voluntary contributions, has refused to consider any other changes to enhance the remedies that benefit competition and the CLECs. The possibility of controlling $6 million in investment has had perverse effects. The Commission must determine whether requiring investment in unrelated matters as part of a settlement to the detriment of the CLECs and competition is sound public policy. If the voluntary contributions are retained as part of the settlement, there is really no limit to what Staff can demand to settle a case in the future.

F. Wholesale Rate Implementation

In the Show Cause case, "Staff recommended that Qwest be ordered to implement billing and systems process changes that will allow it to implement wholesale rates within 30 days."[35] In the Settlement Agreement, Staff agrees to language that states that "Qwest shall implement prospectively all ordered wholesale rates within 60 days from the effective date of the final Commission decision approving rates and setting forth the numeric wholesale rates to be implemented." Section 15. There is no explanation for the change from 30 days to 60 days. Once again, it appears that Staff has backed-off of its earlier recommendation.

G. Requirement to Support and Defend Agreement

The Agreement contains a provision that requires a signatory party to support and defend the Agreement "before the Commission or other regulatory agency or before any court in which it may be an issue." Section 23. This provision creates difficulties for CLECs wishing to sign on to the Agreement. If a CLEC disagrees with many of the provisions in the Agreement but wants to obtain the benefit of some of the provisions, it would have to waive its objections and support the Agreement as a whole, even provisions it may have fundamental disagreements with. Furthermore, there is some question as to whether a CLEC could criticize the Agreement before regulatory agencies

[35] Rowell Direct at 20.

in other jurisdictions where Qwest's compliance with Section 252 is an issue. The ambiguity inherent in this section raises concerns with AT&T.

III. CONCLUSION

It appears to AT&T that Qwest and Staff have attempted to structure the settlement in such a manner to give the appearance that the settlement as a whole imposes considerable costs on Qwest. Staff and Qwest place a total dollar value on the "package" of approximately $21,000,000. However, as noted by AT&T, Staff is advocating an enormous reduction in the penalties it recommended just a few months ago. Staff's previously recommended penalties alone totaled $22,651,000, and that was exclusive of credits to remedy past discrimination. Staff has traded off $6,000,000 of recommended penalties in the form of voluntary contributions that benefit Qwest publicly and privately, but do not benefit the CLECs in any manner. CLECs are required to release all claims against Qwest, but the Agreement does not attempt to remedy claims that the CLECs are required to forego. The Settlement Agreement is fundamentally flawed. RUCO and all the CLECs chose not to sign on. Since the Litigation that the Settlement Agreement attempts to resolve directly affected competition and the CLECs, the failure of other parties to sign on should raise serious questions by the Commission.

The best solution is to reject the Settlement Agreement and resolve each of the proceedings based on the evidence in the records.

Dated this 6th day of August, 2003.

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC. AND TCG PHOENIX

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CERTIFICATE OF SERVICE

I certify that the original and 17 copies of AT&T'S RESPONSE TO SETTLEMENT AGREEMENT FILED JOINTLY BY QWEST AND STAFF JULY 25, 2003 regarding Docket Nos. T-00000A-97-0238, RT-00000F-02-0271, and T-01051B-02-0871 were hand delivered this 6th day of August, 2003, to:

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and that a copy of the foregoing was mailed this 6th day of August, 2003, to the following:

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